

CASE NO. PD-0322-21

IN THE COURT OF CRIMINAL APPEALS  
OF THE  
STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
12/1/2021  
DEANA WILLIAMSON, CLERK

SAMUEL CRAWFORD  
PATTERSON,  
*Appellant*

v.

STATE OF TEXAS,  
*Appellee*

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On Discretionary Review from the  
Tenth Court of Appeals  
Waco, Texas  
Cause Number 10-19-00243-CR

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**APPELLANT'S BRIEF ON THE MERITS**

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## **Identity of Parties and Counsel**

Patterson is satisfied the State's Identity of Parties and Counsel in their Brief on the Merits is accurate. *See*, Rules 38.2 (a)(1)(B) and 70.3 TEX. R. APP. P.

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## Statement of the Case

Patterson is satisfied the State's Statement of the Case in their Brief on the Merits is accurate. *See*, Rules 38.2 (a)(1)(B) and 70.3 TEX. R. APP. P.

Patterson adds that the Court of Appeals decision did not reach the raised and ruled upon issues in the Trial Court Motion to Suppress and briefed issues concerning the three warrantless entries leading to the issuance of the search warrant at issue before this Court.

## **Issue Presented**

### Issue Number One

The search warrant affidavit identified the “suspect place” as the whole of the structure sought to be searched rather than search warrants supported by individual supporting affidavits for individual units and the return does not itemize where seized items from the executed search warrant were found. Incorporating the affidavit into the warrant does not change the general search sought by affidavit and resulting warrant



## Statement of Facts<sup>1</sup>

In the very early morning hours of August 20, 2016 Anton Gridnev (“Gridnev”) died at the Sigma Nu fraternity house in College Station, Texas. Gridnev died as a result of an overdose of drugs, including heroin. (2 RR 54). August 20, 2016 was one week before the start of the Texas A&M University fall semester, and a party had occurred at the Sigma Nu fraternity house on August 19, 2016, continuing into the early morning hours of August 20, 2016. (2 RR 191-192).

Four 911 calls were placed to either the Texas A&M University Police Department or College Station 911 between approximately 4:00 A.M. and 4:20 A.M. on August 20, 2016. (7 RR; SX 2-5; SX 2A). Emergency personnel and the College Station Police Department (“CSPD”) arrived around 4:30 A.M. to find a non-responsive Gridnev laying at the front door of the Sigma Nu fraternity house. (2 RR 41-42, 47).

Three warrantless searches then ensued of the twenty-five individually leased living spaces contained inside the larger fraternity house structure. (2 RR 137 [first]; 2 RR 170-172 [second]; 2 RR 219-220 [third]). Although the evidentiary record does not disclose which of the first two warrantless searches involved Patterson’s leased living space, the third warrantless entry, by CSPD Investigator Garrett (“investigator”),

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<sup>1</sup> The Clerk’s Record is referred to as “CR” and the Reporter’s Record as “RR.” The first number appearing with the Reporter’s Record is volume, with the numbers following page numbers. Exhibits admitted at the Motion to Suppress hearing in the Trial Court is referred to as “SX.”

included Patterson’s living space – unit 216 – as it is identified in the affidavit in support of the required showing of probable cause to search the entirety of the structure. (SX 1, pg. 5 of 6 [affidavit]).

A search warrant was later presented supported by affidavit with the probable cause showing above referenced for authority to search the “suspect place” as described in the affidavit – the entire twenty-five-unit structure and all common areas. (SX 1, pg. 1 of 6 [affidavit]). The magistrate, College Station Municipal Judge Edward Spillane, issued the presented warrant. The warrant described the place to be searched as the “suspect place” as described in the affidavit. (SX 1, pg. 1 of 4 [warrant]). After execution of the search warrant, Patterson was arrested and later formally charged for felony possession of the narcotics listed in his indictment. (2 RR 246); (CR 4).

Further recitation of facts relevant to specific issues are deferred to the issues briefed.

## Summary of Argument

*Obedience to the particularity requirement both in drafting and executing the search warrant is [essential] to protect against the centuries-old fear of general searches and seizures.*

*United States v. Heldt*, 668 F.2d 1238, 1257 (D.C. Cir. 1981)

The search warrant affidavit incorporated by reference into the facially defective warrant in this case defines the “suspect place” as the entirety of the building rather than Patterson’s individual unit. the Court of Appeals found Patterson’s unit was his Fourth Amendment protected space – not the building.

When the affidavit was presented to the magistrate, the investigator knew the “suspect place” described contained individually leased units. Instead of pursuing separate warrants supported by affidavit, the investigator sought a single, general warrant. Nothing in the warrant, affidavit, or return assures these seized items were not located as part of the general search of the of the building.

Officers executing the warrant were not the same as the investigator who presented the affidavit and warrant. The executing officers not involved in securing the warrant were authorized under the warrant and incorporated affidavit without limiting discretion to search all units and common areas of the entire structure based on probable cause involving ten units and a single common area. *Long v. State*, 132 S.W.3d 443 (Tex. Crim. App. 2004) articulates five objectives of the constitutional protection of particularity. Four of those five objectives were thwarted by the substantive defect in the general warrant and incorporated affidavit.

## Argument

### Issue Number One

The search warrant affidavit identified the “suspect place” as the whole of the structure sought to be searched rather than search warrants supported by individual supporting affidavits for individual units and the return does not itemize where seized items from the executed search warrant were found. Incorporating the affidavit into the warrant does not change the general search sought by affidavit and resulting warrant

#### *A. The issue granted on State’s Petition for Discretionary Review*

The warrant defect identified in the Court of Appeals Opinion is a defective description authorizing a general search of the entirety of a structure instead of ten of the twenty-five individually leased and privacy protected units the structure housed. On discretionary review, this Court has taken up the issue of whether the warrant is valid because it facially incorporated the warrant affidavit.

The Particularity Clause of the Fourth Amendment requires specificity in description of the place to be searched separate from the evidentiary showing required for probable cause:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched*, and the persons or things to be seized.

U.S. CONST. AMEND. VI (emphasis added).

The Texas Constitution also requires particularity in description separate from an evidentiary showing of probable cause:

Sec. 9. SEARCHES AND SEIZURES. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and *no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor* without probable cause, supported by oath or affirmation.

TEX. CONST. ART. I, § 9 (emphasis added).

The Texas Code of Criminal Procedure also requires specificity in description in the warrant issued – even if the affidavit is incorporated by reference:

Art. 18.04. CONTENTS OF WARRANT. A search warrant issued under this chapter, Chapter 18A, or Chapter 18B shall be sufficient if it contains the following requisites:

\* \* \*

(2) that it identify as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched.

TEX. CODE CRIM. P. ART. 18.04 § 2.

The crux of the issue presented is whether the ten identified units and single common space listed in the affidavit to persuade the magistrate that evidence of probable cause to search the entire structure – including Patterson’s unit 216 – cures the defective description in the warrant authorizing a general search of the entire twenty-five-unit structure and all common areas as described in both the affidavit and warrant.

*B. The scope of Patterson’s briefing on the issue presented*

The Court of Appeals decided Patterson’s individual living unit contained within the larger fraternity structure was a Fourth Amendment and Article I, Section

10 protected place. *Patterson v. State*, No. 10-19-00243-CR, 2020 WL 7257068 \*4 (Tex. App. – Waco 2020, pet. granted) (not designated for publication) (citing *State v. Rodriguez*, 521 S.W.3d 1 (Tex. Crim. App. 2017)).

The Court of Criminal Appeals granted discretionary review solely on the State’s Ground One – whether the search warrant’s incorporation by reference of the affidavit provided sufficient particularity to meet Constitutional and statutory requirements. Patterson’s Brief on the Merits does not address the Court Appeals decision that Patterson had Fourth Amendment privacy and property protected interest in unit 216.

Likewise, the ground of review granted did not encompass the good faith exception to the warrant requirement. The State’s Brief on the Merits (“State’s Brief”) does not address the issue. If briefing on these issues are needed, Patterson requests the Court order specific additional briefing. *See*, Rule 70.4 TEX. R. APP. P.

### *C. Standard of review*

The issue presented on discretionary review is legal and does not turn on evaluation of credibility and demeanor. Review of the Court of Appeals ruling that the search warrant was an invalid general warrant therefore is *de novo*. *See, Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 1997).

*D. The search warrant affidavit requested a general warrant describing the larger structure and identification of individual units in the affidavit was for the evidentiary showing of probable cause; the affidavit and warrant when read together fail to meet the objectives of particularity of places to be searched as announced in Long v. State, 132 S.W.3d 443 (Tex. Crim. App. 2004)*

This defect to the warrant on discretionary review does not involve a technical or procedural defect. *See e.g. Green v. State*, 799 S.W.2d 756, 757 (Tex. Crim. App. 1990) (alleging typographical error). In this case, the search warrant *and* the warrant affidavit are identical in their substantive description of the place sought to be searched – a sprawling twenty-five-unit structure.

In this case, the affidavit requested and the warrant issued was a single general search warrant. The separate constitutional requirements of particularity and probable cause has been long recognized both in rule and reason by this Court:

When investigators fail to limit themselves to the particulars of the warrant, *both* in the particularity requirement *and* the probable cause requirement are drained of all significance as restraining mechanisms, *and the warrant limitation becomes a practical nullity*. Obedience to the particularity requirement both in drafting and executing the search warrant is therefore *essential to protect against the centuries-old fear of general searches and seizures*.

*Long v. State*, 132 S.W.3d 443, 447-48 (Tex. Crim. App. 2004) (quoting *United States v. Heldt*, 668 F.2d 1238, 1257 (D.C. Cir. 1981) (emphasis added)).

At the time the affidavit was presented to the magistrate, the investigator knew the larger structure contained individually leased units that belonged to the individual lessors – and the affidavit so reflects. (SX 1, pg. 4 of 6 [affidavit]). Instead of presenting separate affidavits requesting individual search warrants, the investigator sought a general warrant supported by single affidavit describing the entirety of the

structure. The return, (SX 1 pg. 1), does not reflect where the items seized in the resulting search were located. Thus, nothing in the warrant, affidavit, or return assures these seized items were not located as part of the authorized general search of the entirety of the building.

The first page of the affidavit shows in capital letters the entire structure is described as the “suspected place.” The second page includes Patterson as a “suspect party” in control of the “suspected place.” The second and third page also request authorization to seize literally any non-fixture item in the entirety of the structure as described in the affidavit to be searched.

The affidavit identifies the “suspected place” as being under the control of the twenty-three “named suspected parties.” The warrant affidavit alleges contraband could be found in the “suspect place” under the control of the suspect parties and requests that narcotics, contraband, and a host of other items be seized from the “suspect place” as described and requests the magistrate to issue a warrant for the described suspected place. The first two pages of the affidavit appear as images below.



5-415-16

THE STATE OF TEXAS §

COUNTY OF BRAZOS §

### AFFIDAVIT FOR SEARCH WARRANT

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED THE AFFIANT HEREIN, A PEACE OFFICER OR SPECIAL INVESTIGATOR UNDER THE LAWS OF TEXAS, WHO, BEING DULY SWORN, ON OATH MADE THE FOLLOWING STATEMENTS:

My name is Investigator J. Reilly Garrett with the College Station Police Department, and, as such, I am a peace officer according to the laws of the State of Texas.

I have reason to believe and do believe that evidence and contraband in violation of the laws of the State of Texas, specifically Texas Health and Safety Code Section 481.115 (Possession of Substance Penalty Group 1); and Section 481.121 (Possession of Marijuana) is contained in suspected place and property described below; and that evidence tending to show that the suspected party listed below committed offenses in violation of Texas Health and Safety Code Section 481.115 (Possession of Substance Penalty Group 1); and Section 481.121 (Possession of Marijuana) is contained in the suspected place/property.

THERE IS IN BRAZOS COUNTY, TEXAS A SUSPECTED PLACE DESCRIBED AND LOCATED AS FOLLOWS:

A multi-story, multi-wing residence building located at 550 Fraternity Row, College Station, Brazos County, Texas. The residence is known as the Sigma Nu Fraternity house and sits on the northeast corner of the Fraternity Row and Deacon Drive intersection. The exterior consists of light beige siding, and light beige colored brick. The main wing consists of a two story structure, with an open balcony with a wrought iron railing running the full length of the front of the building. There is a doorway located in the center. There are two large sized, multi-paned windows to both the right and left side of this doorway. Each window is further described as having dark brown shutters to either side. The lower level holds the main entrance, also centered in the building, with two large sized, multi-paned windows to both the right and left side of this doorway. The front of the residence building has six, individual, brick pillars which reach from the ground to the top of the second story. These pillars are made of beige colored brick. The two center most pillars are adorned with lighting sconces which are positioned near the center of the pillar, height wise. Centered on the second level and attached to the wrought iron railing are the two large, Greek letters for Sigma and Nu, which are dark brown in color surrounded by a white outline. Directly below these letters, the numbers "550" are affixed. The main entrance into the residence building faces towards the southwest and consists of two wooden doors which open outwards. The doors are painted maroon in color; with the right side door having a brown metal, latch style door knob with an attached electronic key pad positioned on the left side of the door. Above the door latch is a brown metal keyhole for a deadbolt style locking mechanism. The attached wing is also two storied and made up of beige colored brick. It is positioned on the northwest side of the main building. The southwest facing side of the attached wing holds four individual windows, two on each level, which consist of multi-paned windows and dark brown colored shutters to each side. Said Suspected Place also includes locations outside of the residence, such as garages, outbuildings, boxes, and other vehicles parked within the curtilage of Said Suspected Place.

SAID SUSPECTED PLACE IS IN CHARGE OF AND CONTROLLED BY EACH OF THE FOLLOWING NAMED PARTIES (HEREAFTER CALLED "SUSPECTED PARTY" WHETHER ONE OR MORE) TO-WIT:

John David Cane, W/M, 7/14/1997	(Said Suspected Party #1)
Jackson Kyle Majewski, W/M, 6/4/1997	(Said Suspected Party #2)
Anton Gridnev, W/M, 8/19/1997	(Said Suspected Party #3)
Ty K. Robertson, W/M, 8/10/1995	(Said Suspected Party #4)
Nathan Andrew Taylor, W/M, 7/19/1995	(Said Suspected Party #5)
Brandon Little, Unknown Race/D.O.B.	(Said Suspected Party #6)
Zachary Kelsae Farmer, W/M, 2/26/1996	(Said Suspected Party #7)
Aaron Douglas Spring, W/M, 5/30/1996	(Said Suspected Party #8)
Michael Steele Frymire, W/M, 8/13/1996	(Said Suspected Party #9)
Adam James Patrick, W/M, 2/14/1997	(Said Suspected Party #10)
William Pfeiffer, W/M, 5/14/1996	(Said Suspected Party #11)
Justin Wu, A/M, 6/9/1995	(Said Suspected Party #12)
Matthew Durst, Unknown Race/D.O.B.	(Said Suspected Party #13)
Maxwell Arthur Gollomp, W/M, 10/22/1996	(Said Suspected Party #14)
Benjamin Jean Castagno, W/M, 12/27/1994	(Said Suspected Party #15)
Christian Andrew Sandford, W/M, 9/8/1997	(Said Suspected Party #16)
Benjamin Allan Ray, W/M, 5/31/1995	(Said Suspected Party #17)
Brian Ogden, Unknown Race/D.O.B.	(Said Suspected Party #18)
Alec Statler, Unknown Race/D.O.B.	(Said Suspected Party #19)
Andrew Davis Hyman, Unknown Race/D.O.B.	(Said Suspected Party #20)
Cole Chase Teel-Jongeblood, W/M, 3/12/1996	(Said Suspected Party #21)
Samuel Crawford Patterson, W/M, 7/12/1995	(Said Suspected Party #22)
Thomas James Emeterio, W/M, 8/10/1995	(Said Suspected Party #23)

IT IS THE BELIEF OF AFFIANT, AND AFFIANT HEREBY CHARGES AND ACCUSES THAT SAID SUSPECTED PARTY HAS POSSESSION OF AND IS CONCEALING AT SAID SUSPECTED PLACE IN VIOLATION OF THE LAWS OF TEXAS OR ITEMS WHICH MAY BE EVIDENCE OF A CRIME, THE FOLLOWING DESCRIBED PERSONAL PROPERTY, TO-WIT:

- A. A usable quantity of MARIJUANA, HEROIN, COCAINE, MOLLY (3,4-methylenedioxy-methamphetamine (MDMA) and items commonly associated with the use, packaging and sales of MARIJUANA, HEROIN, COCAINE, MOLLY (3,4-methylenedioxy-methamphetamine (MDMA), including scales, weighing devices, and measuring devices, packaging materials including paper bindles, glass vials, and plastic baggies, foils, sifters, filters, screens and cutting agents. Additionally, paraphernalia such as glass pipes and bongs, straws, syringes.
- B. Documents of sales of controlled substances consisting of buy/sales lists; record of personal and business transactions as relates to the purchase and sales of marijuana
- C. Financial records to facilitate the investigation of the laundering of illicitly obtained monies and/or other forms of assets acquired through criminal activity and subsequent evasion of governmental taxes, which include, but are not limited to, federal and state tax returns, employment papers,

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Later in the affidavit, on pages four and five, imaged below under the heading “Synopsis of Investigation,” the investigator attests to the constitutional and statutory required showing of probable cause. That probable cause was based on multiple warrantless entries into the individual units. The affidavit makes explicit at the top of page four the information that follows, including the identification of individual units on page five, is for the purpose of probable cause.



AFFIANT HAS PROBABLE CAUSE FOR THE SAID BELIEF BY REASON OF THE FOLLOWING FACTS, TO-WIT:

#### BACKGROUND OF AFFIANT

Affiant is a peace officer of the State of Texas and has been a peace officer for over 5 years (June 2011) and am presently employed by the College Station Police Department, as an Investigator in the Special Investigations Unit (SIU), a part of the Criminal Investigations Division. Affiant has received training in Basic Narcotics Investigations from the Regional Counterdrug Training Academy, as well as having additional experience and training in the recognition of marijuana, heroin, cocaine and MDMA by sight and smell. Affiant has participated in numerous street level narcotics investigations and currently holds an Intermediate Peace Officer certificate. Affiant has previously served narcotics search warrants and has participated in the service of numerous other narcotics search warrants. Affiant served on the Patrol Division from 2011 until 2014, where he was a Field Training Officer and SWAT Operator. In 2014 Affiant began serving in the Criminal Investigations Division. Affiant is currently assigned to the Special Investigations Unit within the Criminal Investigations Division.

#### SYNOPSIS OF INVESTIGATION

On 8/20/16, at approximately 0441 hours, an emergency call was transferred to the College Station Police Department from the Texas A&M University Police Department. The caller advised that she was currently located at Said Suspected Place and believed that Said Suspected Party #3 was suffering from an overdose. The caller reported that she had been advised that Said Suspected Party #3 had been taking some type of opioid. The College Station Fire and Police Departments responded and found Said Suspected Party #3 to be on the ground near the front doorway to Said Suspected Place. Emergency medical treatment was provided and Said Suspected Party #3 was transported to the College Station Medical Center where he was later pronounced deceased.

The on-scene investigation revealed Said Suspected Place to be operated by the Sigma Nu Fraternity, and consisting of multiple common areas such as entertainment rooms, meeting rooms, kitchen, bathrooms, and 25 individual bedrooms which are rented by the Said Suspected Parties. On this date, the Fraternity hosted a party which was attended by a large number of people; both residents and non-residents. It was determined that at approximately 0410 hours, the College Station Medical Center received a call inquiring as to what actions should be taken when someone has overdosed. A second call was received approximately 15 minutes later, again inquiring as to what should be done and further stating that they did not want the Police involved due to the "substances" that would be found at the Said Suspected Place. The emergency call to EMS and Police was then received at approximately 0441 hours; with the first unit arriving at 0448 hours. Witnesses interviewed on scene reported that Said Suspected Party #3 had been celebrating his birthday (8/19/16) and was known to have ingested an unknown quantity of: Alprazolam, Hydrocodone, MDMA, and possibly Heroin, within the hours preceding his death. He was found unconscious and unresponsive by Said Suspected Party #22 and dragged from his bedroom on the first floor, to the main entrance of the residence where he was found by first responders.

During the initial response by the Police arriving on scene, a protective sweep was conducted of the entirety of the residence in an attempt to locate any additional victims, witnesses. During this sweep, the following items were observed in plain view:

1. Down stairs theater room – coffee table: a zip lock style sandwich bag, lighter, small metal screen commonly used as paraphernalia when smoking marijuana or THC concentrates, and a second plastic bag with a small amount of what appeared to be THC concentrate on it.
2. Room #104 belonging to Said Suspected Party #3 (Decedent) – desktop: a drinking straw which had been cut into three sections, a white powdery substance consistent with the appearance of cocaine, a key card with a white powdery substance on it, a prescription pill bottle for Vyvanse in the name of Said Suspected Party #22.
3. Room #105 belonging to Said Suspected Party #4 – nightstand near bed: small glass pipe with burned marijuana residue.
4. Room #213 belonging to Said Suspected Party #19 – desktop: small circular mirror with cut straws, crushed blue colored powder, two small plastic baggies with white colored residue. Prescription pill bottle with label removed and containing marijuana was found on an adjacent shelf.
5. Room #216 belonging to Said Suspected Party #22 – coffee table: two small plastic baggies with white colored residue, white powdery substance arranged in a line.
6. Room #214 belonging to Said Suspected Party #20 – coffee table: metal grinder with marijuana residue.
7. Room #210 belonging to Said Suspected Party #16 – desktop: prescription bottle with marijuana residue.
8. Room #207 belonging to Said Suspected Party #13 – desktop: glass bong.
9. Room #202 belonging to Said Suspected Party #8 – closet shelf: glass jar with mushrooms consistent in appearance with Psilocybin mushrooms.
10. Room #203 belonging to Said Suspected Party #9 – nightstand: glass bong and metal grinder. Nearby desktop: marijuana residue.
11. Room #208 belonging to Said Suspected Party #14 – dresser top: glass pipe with burned marijuana, metal grinder.

#### REQUEST TO SEARCH FOR DIGITAL EVIDENCE

Based on Affiant's experience, narcotics use and sales are an ongoing criminal venture. Based on Affiant's experience and training, Affiant knows that items of evidence of such ongoing ventures will be kept in a person's residence. Such evidence can include items like ledgers and phone messages which are generally maintained for extended periods of time.

Based on Affiant's training and experience, in order to completely and accurately retrieve data maintained in computer or cell phone hardware or on computer or cell phone software, to ensure accuracy and completeness of such data, and to prevent the loss of the data either from accidental or programmed destruction, it is often necessary that computer hard drives or cell phones be copied and examined by a qualified computer specialist.

Affiant is therefore requesting that a forensic examination of any computer, cellular telephone and computer related media found at the above locations be conducted for evidence of criminal activity, specifically related to the planning and commission of this offense.

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The identification of the individual units in the affidavit was used to request a search of *the entire structure*. It was evidentiary, not descriptive. This is neither the equivalent of, nor a substitute for constitutional and statutory requirements of particularity of description of the place to be searched. U.S. CONST. AMEND. VI; *See also, Long*, supra; *Maryland v. Garrison*, 480 U.S. 79, 85-86 (1987).

*Long v. State* recognized the difference between these separate requirements and the reasons for them. 132 S.W.3d 443 (Tex. Crim. App. 2004). *Long* lists five

objectives of the particularity clause requirement. *Id.* At least four of the five objectives are thwarted in this case when incorporating the affidavit into the warrant:

- Ensuring the officer searches the right place;
- Confirming probable cause is established for the place *described in the warrant*;
- *Limiting* the officer's *discretion* and *narrowing* the scope of his search;
- Minimizing the danger *of mistakenly searching* the property of *an innocent bystander or property owner*; and
- Informing the owner of the officer's authority to search that specific location.

*Id.*

The investigator's affidavit sought to inform and persuade the magistrate that probable cause existed *and* justified a search of all twenty-five units and all common areas housed in the larger structure later authorized to be searched. The probable cause showing in the affidavit was for ten individual units and a single common area. Thus, the affidavit did not ensure the executing officer would search the *right place* – the affidavit sought general authority from the magistrate to the search and seizure of items in the whole of the building.

The affidavit did not confirm evidence of probable cause existed *for the place described* in the affidavit and warrant. Evidence of probable cause as presented to the magistrate was not for Patterson's protected living space, but for the entirety of the structure. Thus, no assurance existed, based on the description for the place requested

by the investigator, that the *right place as it was described* in the affidavit and warrant would be searched.

The description *did not limit or narrow the scope of the search* resulting from the three warrantless entries into the private dwelling units forming the evidentiary basis for probable cause in the affidavit. The affidavit *did not serve to narrow the premises asked by the affidavit to be searched* – the listing of the individual units with contraband on page five of the affidavit was for the purpose of establishing probable cause to search the *entirety* of the structure, and *not* to describe the place that law enforcement sought to inform and persuade the magistrate should be searched.

The warrant *did not minimize the danger of mistakenly searching an innocent property owner's unit* because the warrant and the affidavit requested and persuaded the magistrate to search the entirety of the structure. All twenty-five units inside the larger structure, not just the ten individual units documented in the affidavit, were fair game under the warrant as part of the description of the “suspected place” in the affidavit.

The purpose of the particularity requirement is to protect against the kind of general search requested and authorized by warrant in this case. By limiting authorization to search the specific areas described, the requirement ensures the search will be tailored to its justifications and will not take on the character of a wide-ranging exploratory search. *See, e.g. Berger v. New York*, 388 U.S. 41, 58 (1967) (observing search warrants must be carefully drafted to prevent unauthorized invasions of the sanctity of a home and the privacies of life.)

The Return from the warrant (SX 1, pg. 1) does not disclose where the items listed were found and seized. There was nothing to ensure given the description of the “suspected place” where those items were seized or in what items were seized in relation to the “suspect parties” *See, e.g. Etchieson v. State*, 574 S.W.2d 753, 759 (Tex. Crim. App. 1978) (description of property must be sufficient to enable the executing officer to locate and distinguish property from others in the community).

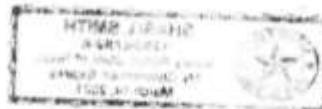
RETURN

STATE OF TEXAS

COUNTY OF BRAZOS

The undersigned Affiant, being a peace Officer under the laws of Texas and being duly sworn, on oath certifies that the foregoing Warrant came to hand on the day it was issued and that it was executed on the 20 day of August, A.D., 2016, by making the search directed therein and by seizing during such search the following described property:

- PARAPHERNALIA
- CELLULAR TELEPHONES
- U.S. CURRENCY
- MDMA
- COCAINE
- MARIJUANA
- PSYLOCYBIN MUSHROOMS
- ALPACAZAM
- ADDERALL
- THE EXTRACTS
- BLOTTER PAPER (SUSPECTED ACID)
- GLOCK MODEL 17 / SERIAL # AP2071
- REMINGTON MODEL 1100 / SERIAL # L231862K



P. Garcia #844 P. Garcia C.S.P.D.  
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME by the said Affiant whose name is signed above on this the 20 day of August, A.D., 2016.

J. Huth #740 C.S.P.D. #740  
Judge BRAZOS COUNTY  
J. Huth

If the place requested to be searched is determined by the information establishing probable cause, that investigation as reflected in the affidavit, and decided by the Court of Appeals, established the privacy interests of Patterson in unit 216. The investigator nevertheless requested a general search warrant that did not prevent the wrong place – the entirety of the building and all common spaces – from being searched. The affidavit and warrant did not prevent the wrong place – other spaces or places within the building that probable cause allegedly existed – to be searched. The return, warrant, and affidavit do not show where those items were seized from within the entirety of the structure authorized by the warrant and requested by the affidavit.

The investigator who presented the affidavit did not participate in executing the search warrant after its issuance. That the same law enforcement officer presenting the affidavit also executed the warrant has been significant to this Court's past decisions on incorporating affidavits by reference. *See, Long* at 447 (objective two – limiting the officer's discretion and objective four – narrowing search; informing the owner of the officer's authority to search that specific location).

This Court has pointed to the same officer seeking and executing the warrant in finding particularity was satisfied by incorporation of the affidavit. *See, e.g., Bridges v. State*, 574 S.W.2d 560 (Tex. Crim. App. 1978) (affirming denial of suppression motion where warrant correctly described street address, color, and type of construction of single family dwelling, but mistakenly omitted town where address was located *when* same officers who presented the supporting affidavit executed the issued warrant); *See*



also *Smith v. State*, 962 S.W.2d 178, 179 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1998, pet. ref'd) (discussing and analyzing relevance of warrant affiant being the executing officer on sufficiency of description).<sup>2</sup>

This logic is straightforward and applicable to this case: if the officer seeking and executing the warrant is the same individual, then they know where to search. Here different police officers executing the warrant would know the magistrate found probable cause, but were authorized by the face of the warrant and incorporated affidavit to search the entire structure and seize anything literally not tied down.

At the suppression hearing the investigator that presented the affidavit and secured the search warrant based upon the affidavit testified he did not participate in executing the warrant. (2 RR 230) (“I would not have actively participated in the searching of any of the residence. Essentially, we have other people that facilitate the search.”).

In *Maryland v. Garrison*, the Supreme Court of the United States addressed circumstances, as here, that evidence of probable cause exists, but law enforcement

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<sup>2</sup> In *Smith*, the panel opinion acknowledged a split of authority in Texas – whether a warrant affidavit can cure a descriptive defect in a warrant. *Smith*, 962 S.W.2d at 182 (cases holding executing officer’s personal knowledge to cure description errors). *See also, Id.* at 183-84 (cases holding a court may consider the executing officer’s personal knowledge of the location to be searched to cure description errors in the warrant.). The Court of Appeals wrote: “These two lines of authority cannot be reconciled, at least by us.” *Id.* at 181. As argued in this Brief, because there was a substantive error in the premises sought to be searched – the larger structure and not the individual units within – the supporting affidavit’s specific listing of dwelling units and individual lessors does not cure the fundamental problem with the general description sought by the affidavit and the later executed warrant.

knew at the time of presentment that the premises asked to be searched was overbroad. 480 U.S. 79 (1987). In *Garrison*, the Court was confronted with a search warrant that authorized the search of a *described* third floor apartment. When law enforcement arrived, they searched not just the apartment of the named suspect described in the warrant, but the entirety of the third floor. The Court framed the defect in the warrant as turning on the knowledge of law enforcement about the nature of the third floor apartment at the time they sought the warrant. *Id.* at 80.

The Court decided the descriptive mistake did not invalidate the warrant because law enforcement could not have known at the time the warrant was presented that the third floor contained not just one, but two apartments:

Plainly, if the officers *had known, or even if they should have known*, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. *The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate.*

*Id.* at 85 (emphasis added).

*Garrison* illustrates why incorporation of the affidavit into the warrant in this case does not cure the defective general warrant. In *Garrison* what if the presenting officer viewed contraband in plain view in the separate apartment and included this as

evidence of probable cause? If so, the officer would have necessarily also known the third floor contained separate units, but still sought the defective general warrant for the entirety of the third floor.

The affidavit's probable cause showing was evidentiary, not descriptive – and the investigator knew as evidenced by the affidavit that Fourth Amendment protected spaces existed rather than the entirety of the structure described. The investigator knew particularity in description tailored to that knowledge was necessary. The general warrant requested and the warrant issued did not particularize the “suspect place” based on this knowledge and did not limit the discretion of the officers executing the warrant – it broadened that discretion beyond constitutional boundaries.

In this case, the investigator presenting the affidavit knew at the time he presented the affidavit and warrant the premises description he sought by warrant was overbroad. Going behind the warrant and affidavit, as *Garrison* and *Green* hold is proper, at the suppression hearing the investigator testified his investigation included his interview with the fraternity house manager, Aaron Springs. (2 RR 221). The investigator testified Springs was able to identify all the residents of the house, as well as their unit numbers. (2 RR 222).

The investigator testified this information led to what appears in the warrant affidavit that “[t]here were twenty-five individual bedrooms which are rented by the said suspected parties.” (2 RR 237) (emphasis added). As significant, the investigator was questioned about this specific sentence at the suppression hearing. He testified he knew, based on

the information received from house manager Springs, the living units were not bedrooms inside a larger structure, but individually leased units:

[Question by defense counsel]: Can you look at page four of your affidavit under Synopsis of Investigation? Do you see where you told [Magistrate] that there were, 'Multiple common areas, such as, entertainment rooms, meetings rooms, kitchens, and bathrooms.'? Do you see that on the last paragraph on page 4 of your affidavit at the top of the paragraph?

[Answer by investigator]: Yes, sir.

[Question]: But do you also see where you recognized at that time that in addition to these common areas, there were 25 individual bedrooms which are rented by the said suspected parties. Do you recall telling the magistrate that?

[Answer]: Yes.

[Question]: Because that was your belief at the time?

[Answer]: Yes.

[Question]: Not that this would be for all like bedrooms of a house, but these were rented rooms by different individuals; correct?

[Answer]: Correct.

(2 RR 237).

The investigator, despite this knowledge, sought by affidavit to request authorization to search the entirety of the structure described as the "suspect place."

The investigator knew of Patterson's privacy and trespass interest in Unit 216, and indeed, of all the individuals in the twenty-five units inside the structure. Probable cause from warrantless entries in the affidavit extended to ten units and one common

area. The affidavit does not, and should not, cure the general search authorized in both the warrant and supporting affidavit.

In *Green v. State* this Court stated the legal rule underpinning discretionary review in this case: “the description in the affidavit of the place to be searched controls the description of the place in the search warrant.” 799 S.W.2d 756, 760 (Tex. Crim. App. 1990) (citing *McTyre v. State*, 19 S.W.2d 49 (1929) and *Phenix v. State*, 488 S.W.2d 759 (Tex. Crim. App. 1972)). In this case, the affidavit and the warrant describe the place to be searched (the “suspected place”) as the larger structure rather than the individual privacy and property protected units.

In *Green*, the search warrant was signed on March 20, 1987 but the return dated March 25, 1987. *Id.* The discrepancy extended to the affidavit – the warrant facially showed it was dated earlier than the affidavit. *Id.* The Court of Criminal Appeals wrote this facially violated statutory requirements that the warrant be executed within three days of issuance. *Id.* at 757. The trial court denied suppression, finding that the information supporting the warrant was received by the magistrate on March 25, 1987 and not March 20, 1987. *Id.* at 759-60. The Court of Appeals reversed. *Green v. State*, 765 S.W.2d 887 (Tex. App. – San Antonio 1989) *affirmed* 799 S.W.2d 756 (1990).

In *Green* this Court held that “[we] review technical discrepancies with a judicious eye for the procedural aspects surrounding the issuance and execution of the warrant. To do otherwise would defeat the purpose behind the warrant requirement, and provide protection for those to whom the issue on appeal is not one based upon

the substantive issue of probable cause but of technical default by the State.” *Id.* at 757-58. In this case, the issue is not a typographical, technical error. It is substantive as the place the magistrate was asked to allow law enforcement to search was the entirety of the structure.

The State characterized the error in *Green* as technical. *Id.* at 760. This Court wrote it was necessary for the State to explain why the warrant was dated on a “earlier day than the affidavit,” *Id.* at 761, identifying the problem as the “danger posed by the possible use of pre-signed warrants or the alteration of affidavits after issuance is too great for this Court to consider such discrepancies a matter of inconsequential irregularity[.]” *Id.* This Court ultimately held the State failed to present evidence explaining the discrepancy, finding the warrant was invalid. *Id.* at 761.

*Green* cited *Phenix v. State*, 488 S.W.2d 759 (Tex. Crim. App. 1972) in holding that affidavits incorporated by reference become “part of, and can be used in aid the description in, the search warrant.” *Green*, 765 S.W.2d at 760 (citing *Phenix*). A reading of *Phenix* shows the defect to be technical rather than a substantive description defect.

In *Phenix*, the Court of Criminal Appeals analyzed a warrant regarding a search of a garage apartment where marijuana was found throughout. 488 S.W.2d 759, 761. The search claim in *Phenix* was that the affidavit was insufficient because it “failed to allege that contraband narcotics were being concealed at the described place, but only alleged that certain ‘personal property’ was being there concealed.” *Id.* at 764. This Court held the alleged defect as not descriptive, but technical:

The affidavit upon which the search warrant issued, and which was both attached thereto and incorporated by reference therein, alleged that the appellant was in possession of ‘personal property, to-wit: marihuana.’ Possession of Marihuana is proscribed. The characterization of the marihuana as ‘personal property,’ whether technically correct or not, is immaterial and certainly does not render the affidavit fatally defective.

*Id.* at 764.

*Green* and *Phenix* did not address the issue of a general warrant describing a larger structure containing what the presenting officer knew at the time of presentation were individual dwelling spaces and multiple common areas. *Green* was not a defective description case and the warrant in *Phenix* particularly described the premises the affiant sought to be searched. That did not occur in this case.

Another case cited by the State in their Brief on the Merits, *Rios v. State*, 901 S.W.2d 704 (Tex. App. – San Antonio 1995, no pet.), makes plain how that case is inapplicable to the substantive descriptive defects in the search warrant and the warrant affidavit in this case. In *Rios*, the warrant *accurately* described the place to be searched – a house – but commanded not a search of that house, but a “suspected vehicle described at that location.” *Id.* at 705-706. The Court of Appeals cited *Green* for the proposition that “*Technical* discrepancies as to *dates and times* do not automatically invalidate a search warrant.” *Id.* (citing *Green* at 759) (emphasis added).

The *Rios* Court’s analysis also relied on the good faith exception to the warrant requirement recognized in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) and Art. 38.23(b), TEX. CODE CRIM. P. In relying on the good faith exception, the

*Rios* Court decided the defect in language was technical and the correct description of the dwelling sought in the warrant and affidavit was relied upon within the requirements of the good faith exception:

Based upon *Phenix, Green, Leon* and Art. 38.23, all *supra*, we hold that when a search warrant contains a *typographical error* in the description of the place to be searched and the warrant incorporates the supporting affidavit which contains a correct description of the place to be searched, the trial court does not err in refusing to suppress the evidence seized during the search. We fail to see any Fourth Amendment benefit to be derived from suppressing this evidence.

*Rios* at 708 (emphasis added).

This is the reason why the warrant affiant's investigation identification of Unit 216 for the purpose of evidence of probable cause for searching the entirety of the structure does not cure the warrant's general description defect. The investigator sought, without mistaken belief, what he meant to secure from the magistrate: a warrant for the entire described structure. Though the affidavit attests the unit belonged to Patterson under a written lease, the investigator still sought the overbroad, general warrant for the entire structure.

The cases cited by the State in their Brief are inapplicable to the real property description defect at issue or otherwise distinguishable. *Affatato v. State*, 169 S.W.3d 313 (Tex. App. – Austin 2005, no pet.) is the closest in fact pattern. However, the warrant and affidavit in *Affatato* correctly described the premises sought to be searched – an individual apartment unit part of a larger complex. *Id.* at 315. There was not separate privacy interest in the non-proximate garage apart from the apartment



correctly described. Law enforcement were therefore “able to distinguish it from other garages in the community.” *Id.* at 317.

The outcome in *Affatato* would arguably be different if the property description was for the larger apartment complex but evidence of probable cause was contraband left in plain view in an individual unit. By similar example, if an affidavit and warrant described a fifty-unit hotel complex to be searched, with evidence of probable cause to search the entirety of the described premises based on contraband in plain view in one individual rented unit, particularity is not satisfied. To decide otherwise would irretrievably confuse the separate constitutional and statutory requirements of evidentiary probable cause and particularity of description of the place to be searched.

Two other cases cited by the State, *Bowden v. State*, No. 08-19-00057-CR, 2021 WL 3661163 (Tex. App. – El Paso, August 18, 2021, no pet.) and *Farek v. State*, 01-18-00385 (Tex. App. – Houston [1<sup>st</sup> Dist.] June 25, 2019, pet. ref’d) involve cell phone search warrants. *Bowden* involved a procedural, technical error in the warrant that, citing *Green*, was explained as a typographical error by resort to the affidavit and testimony at the suppression hearing. *Bowden* at \*11. It is inapposite to the issue here on discretionary review.

In *Farek*, the defendant argued the warrant correctly described the cell phone but was nevertheless overbroad because of the data requested to be seized from the phone. The Court of Appeals framed the defendant’s arguments on overbreadth

because the warrant authorized a search of “any and all other digital data” and “any and all deleted digital data.” *Id.* at \*10.

The Court of Appeals noted in affirming the trial court denial of the motion to suppress by pointing to connection made by the affidavit: “the warrant and supporting affidavit directly linked the evidence being sought to the offense being investigated at the time the warrant was obtained.” *Id.* However, the issue in this case is the *description* of the property to be searched. The result in *Farek* would be, again, arguably different if the cell phone subject of the warrant had been improperly described. That is the issue in this case. Or, if the defendant there had multiple cell phones with probable cause stated in the affidavit identifying the phone actually searched, but the warrant and affidavit described another phone.

In sum, the warrantless entries that provided evidentiary support for probable cause were not the equivalent of the defective general search of the twenty-five-unit structure described as the “suspected place” in both the search warrant and the incorporated affidavit. Officers executing the warrant were not the same as those who sought the warrant or who made the three warrantless entries supporting the probable cause showing in the affidavit. These executing officers were authorized with no limiting discretion to search all units and common areas of the structure.

A finding of validity will encourage single warrants for the whole of a structure rather than particularized descriptions of Fourth Amendment protected privacy and property protected spaces. The affidavit asked for and the warrant authorized a

general search of the entire structure without particularized description required under the United States and Texas Constitutions and State law.

### **Conclusion and Relief Requested**

The Court of Appeals decision reversing and remanding this case to the Trial Court should be affirmed.

RESPECTFULLY SUBMITTED,

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I certify the foregoing document has a word count of 5,002 based on the word count program in Word 2019.

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I certify a true and correct copy of Appellant's Brief on the Merits was forwarded to counsel of record listed below via electronic filing on the 30<sup>th</sup> day of November, 2021:

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